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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 1561

DANIEL T. FRIDENA, *deceased, Petitioner,*

vs.

ARIZONA OSTEOPATHIC MEDICAL ASSOCIATION, an Arizona Corporation and PHOENIX GENERAL HOSPITAL, INC., and Arizona Corporation,
Respondents.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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INDEX

	Page
Jurisdiction	1
Statement	2
Questions Presented	3
Reasons for Denying the Writ	3
Conclusion	5

TABLE OF CASES AND AUTHORITIES CITED

Cases: *Page*

Brockington v. Rhodes, 396 U.S. 41, 90 S. Ct. 206, 24 L. Ed. 2d 209 (1969) 3

Cherry v. Heffernan, 132 Fla. 386, 182 So. 427 (1938) 3

Creadick v. Keller, 35 Del. 169, 160 A. 909 (1932) 3

Fletcher v. Bryan, 361 U.S. 126, 80 S. Ct. 263, 4 L. Ed. 2d 180 (1959) 3

Glidewell v. Talley, No. 9843 (Ariz. April 13, 1970) 3

Golden v. Zwickler, 394 U.S. 103, 89 S. Ct. 956, 22 L. Ed. 2d 113 (1969) 3

Goodman v. Jones, 102 Ariz. 532, 433 P. 2d 980 (1967) 3

Hall v. Beals, 396 U.S. 45, 90 S. Ct. 200, 24 L. Ed. 2d 214 (1969) 3

Hess v. Pawloski, 274 U.S. 352, 47 S. Ct. 632, 71 L. Ed. 1091 (1927) 4

Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 70 S. Ct. 652, 94 L. Ed. 865 (1950) 4

Rowan v. Post Office Dept., 38 U.S.L.W. 4343 (May 4, 1970) 4

Wuchter v. Pizzuti, 276 U.S. 13, S. Ct. 259, 72 L. Ed. 446 (1928) 4

Statutes:

28 U.S.C. § 1257(3) 1

Postal Revenue & Federal Salary Act of 1967, Title III 4

TABLE OF CASES AND AUTHORITIES CITED—(Cont'd)

Cases: *Page*

M. Jox, *Non-Resident Motorists Service of Process Acts*, 33 F.R.D. 151 (1963) 4

4 Wright & Miller, *Federal Practice & Procedure* 294 (1969) 4

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JURISDICTION

This is a petition for a writ of certiorari to the Supreme Court of Arizona. The substance of the matter is whether petitioner had adequate notice for dismissal from a medical association. The decision of the court below was filed on January 15, 1970, and a petition for rehearing was denied on February 10, 1970. This petition for certiorari was filed on May 11, 1970. Jurisdiction in this court is claimed under 28 U.S.C. § 1257(3) and, for reasons set forth in the memorandum following, is opposed on the ground of mootness.

STATEMENT

Fridena was an osteopath in Arizona who was expelled from the Arizona Osteopathic Medical Association and from Phoenix General Hospital, Inc. The expulsion from the hospital followed the expulsion from the Association, and the latter is the critical matter.

The bylaws of the Association provided for notice by registered mail. Fridena was well acquainted with these bylaws, having been a member of the ethics committee of the organization as well as a member of its board of trustees; and he had full experience with these bylaws. However, as is apparent from the record here, Fridena was something of an eccentric. He did not allow his employees to receive registered mail in the office and would not himself call for it at the post office.

In the instant case, Fridena had attended a preliminary conference with the appropriate Association committee and was aware that, if the committee thought proper, a formal hearing would follow. A copy of a formal complaint was then sent to Fridena by registered mail. Fridena's employees declined to accept the communication which was returned to the post office. Fridena then had an employee telephone the post office, learned that the communication to him was from the Association, and declined to take possession of it. It was returned to the Association.

The Association thereupon met and expelled Fridena, who did not appear.

Subsequently, Fridena instituted an action for a writ of mandamus to require his reinstatement in both organizations. No other relief was sought nor was possible within the scope of the mandamus action. While the matter was pending, Fridena died.

Under Arizona practice, a moot matter may, at the discretion of the court, be considered. The Arizona Supreme Court recognized that the matter was moot, but nonetheless saw fit to hold that the notice to Fridena met all legal standards. This petition followed.

QUESTIONS PRESENTED

1. Will this Court hear a claim for reinstatement in an organization where the claimant has died?

2. Under what circumstances is a bona fide effort to serve notice by registered mail adequate to meet constitutional standards?

REASONS FOR DENYING THE WRIT

1. This matter is moot. Some state jurisdictions will give advisory opinions, and, illustratively, Arizona did conclude to decide here what is obviously a moot matter. But this is not the federal practice; here no relief could conceivably be given and the matter is totally abstract. Upon the death of a petitioner, a mandamus case becomes moot and cannot be heard; *Fletcher v. Bryan,* 361 U.S. 126, 80 S. Ct. 263, 4 L. Ed. 2d 180 (1959). The petition becomes a pure request for an advisory opinion, which this Court will not give. *Brockington v. Rhodes,* 396 U.S. 41, 90 S. Ct. 206, 24 L. Ed 2d 209 (1969); *Hall v. Beals,* 396 U.S. 45, 90 S. Ct. 200, 24 L. Ed. 2d 214 (1969); *Golden v. Zwickler,* 394 U.S. 103, S. Ct. 956, 22 L. Ed. 2d 113 (1969).

2. The notice was sufficient; no conflict is presented nor does the case present any important question. At most it depends totally on its facts.

Arizona follows the practice that mail notice may be given when expressly authorized, *Goodman v. Jones,* 102 Ariz. 532, 433 P. 2d 980 (1967), though not when it is not authorized; *see Glidewell v. Talley,* No. 9843 (Ariz. April 13, 1970), expressly distinguishing *Fridena* on the ground that without some clean-cut establishment of a proper address, mail notice might fail to apprise a respondent of the charges against him.

The Constitution requires nothing more. A person may not insulate himself from notice by rejecting formal mail where he has been fully informed, as Fridena was, that this is the method of sending notice. *Creadick v. Keller,* 35 Del. 169, 160 A. 909 (1932); *Cherry v. Heffernan,* 132 Fla. 386, 182 So. 427 (1938).

The notice was in fact taken to Fridena. Nothing in the due process clause required that is be carried by a process server rather than a mailman. Service by registered mail has been "of unquestioned validity" since *Hess v. Pawloski*, 274 U.S. 352, 47 S. Ct. 632, 71 L. Ed. 1091 (1927), 4 Wright & Miller, *Federal Practice & Procedure*, 294 (1969). All that is required of mail notice is that it be designed "so as to make it reasonably probable that [the defendant] will receive actual notice," *Wuchter v. Pizzuti*, 276 U.S. 13, 19, 48 S. Ct. 259, 72 L. Ed. 446 (1928). A return receipt is not constitutionally required, and is very commonly not used in the non-resident motorist cases, M. Jox, *Non-Resident Motorists Service of Process Acts*, 33 F.R.D. 151, 189 (1963). *See Rowan v. Post Office Dept.*, 38 U.S.L.W. 4343 (May 4, 1970), which upholds as meeting due process requirements Title III of the Postal Revenue & Federal Salary Act of 1967, which includes, as here, the use of registered mail as the device of giving notice of a claimed offense. Fridena deserves no sympathy—he was simply hiding out. The notice was fully up to the standard of *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 70 S. Ct. 652, 94 L. Ed. 865 (1950).

CONCLUSION

It is respectfully submitted that the petition for certiorari should be denied.

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June, 1970.